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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 218

CARMINE P. TRAMUNTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–8a; R. 134–141) is reported at 343 F. 2d 548.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1965 (R. 142). Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including June 4, 1965, and the petition was filed on June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could properly be sentenced to one year's imprisonment for contempt, conditioned

upon his continued refusal to testify before a grand jury, after a non-jury hearing conducted under Rule 42(b) of the Federal Rules of Criminal Procedure.

2. Whether petitioner was lawfully granted immunity with regard to questions which he refused to answer before the grand jury.

3. Whether petitioner had the effective assistance of counsel.

4. Whether petitioner was entitled to inspect the minutes of the grand jury.

STATEMENT

On December 2, 1964, in the District Court for the Southern District of New York, petitioner, in a proceeding under Rule 42(b) F. R. Crim. P., was found to be in contempt for wilfully disobeying an order to answer certain questions before the grand jury after having been granted immunity from prosecution. He was sentenced to imprisonment for one year, with the proviso that, should petitioner answer the questions prior to expiration of the grand jury's term, a further order "may be made terminating the sentence" (R. 130–131). The court of appeals affirmed (R. 142).

The pertinent facts show that in February 1964, petitioner was subpoenaed to testify before the grand jury (R. 96–97). On that occasion, as well as in April and May of 1964, petitioner refused to answer questions on the ground that the answers would incriminate him (R. 113–116, 116–119, 120–123).

On August 4, 1964, the government applied to the district court for an order requiring petitioner to testify before the grand jury under the narcotics im-

munity provisions of 18 U.S.C. 1406. The United States Attorney's affidavit alleged that the grand jury was inquiring into alleged violations of the Federal Narcotics Laws and that petitioner's testimony was necessary and material to the investigation (R. 98–100). The application was made with the approval of the Attorney General (R. 101–102). At a hearing before Judge MacMahon, the questions were read into the record (R. 106–110), and petitioner responded by reading a letter from his counsel which told petitioner to "refuse to answer any question on the ground that your attorney is on two-week activity duty with the United States Army Reserve, and is unable to be present" (R. 110–111; see also R. 129). The court informed petitioner that he had been granted full immunity and directed him to return to the grand jury and answer the questions (R. 111–112; see also Order at R. 103–104). At the suggestion of the government, petitioner's appearance before the grand jury was delayed until August 19 because his lawyer was not present (R. 14–15, 112).

On November 10, 1964, petitioner again appeared before the grand jury and refused to answer the specific questions he had been directed to answer by Judge MacMahon (R. 15). The government requested the court (Judge Wyatt) again to direct petitioner to answer and stated that if he refused to answer, the government would request an order to show why he should not be held in contempt (R. 15). Petitioner's counsel complained that petitioner had been given immunity at a time when the government

knew that petitioner's counsel could not question whether the immunity was properly granted and whether "each and every question" was relevant (R. 17–18). The court assured counsel that he need not make the argument because "I am prepared to hear you now". The court specifically stated that counsel would be given an opportunity to challenge the validity of the grant of the immunity (R. 18). Counsel said there was no basis for the immunity because petitioner had never been connected with narcotics, but only with gambling (R. 18–19). The court noted that the statute did not require that there be a showing that a witness was personally involved in narcotics activities (R. 19–20). Thereafter, the hearing was adjourned to allow counsel time to read the questions (R. 20–21).[1]

On November 12, 1964, a further hearing was had before Judge Wyatt. The judge emphasized that this was not a contempt hearing but was an attempt to use "additional persuasion" to have petitioner answer the questions and not to increase any possible penalty (R. 25, 27, 28). On the question of the relevance of the questions, Judge Wyatt stated (R. 25):

> I have examined the questions, and aside from whether or not I would review Judge MacMahon's finding, I make an independent determination that each and every one of the questions are relevant to the inquiry.

Counsel for petitioner complained that there were questions about gambling in Dade County and Har-

[1] At the close of the hearing, the court left open the question whether counsel could challenge the relevancy of the questions upon which Judge MacMahon had previously ruled (R. 21).

lem, while the investigation concerned narcotics dealings with the "so-called Lucchese group"; that some questions were about Allie Harris, a known gambler, who "has never been alleged to be a member of the Lucchese group by anybody before the McClellan Committee"; and that other questions on narcotics were unfairly phrased. He again reminded the court that counsel had not been present to contest relevancy before Judge MacMahon (R. 26–27). The court stated (R. 27):

> I have examined the questions and I rule that they are relevant.

Thereafter, questions were read to petitioner and he indicated which he would answer and which he would decline to answer (R. 30–36).[2] Later that afternoon, the grand jury reported that petitioner had declined to answer certain questions. The court directed him to appear on November 19 and show cause why he should not be punished for contempt (R. 37). A formal order to show cause was entered accompanied by an affidavit of the government outlining the proceedings and setting forth five questions which petitioner had refused to answer after being ordered to answer (R. 4–8). The specific questions were (R. 7):

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[2] Petitioner, with counsel present, refused to answer questions as to when he was last in Florida or "Who is Allie Harris" (R. 30). On the other hand, in regard to Cavallieri and Rosata, who were alleged to be members of Luciano's group, petitioner agreed to answer as to his knowledge of their narcotics activities (R. 35). He also agreed to answer, "Have you ever had any gambling contacts with any one of these individuals?" (R. 36.) A partial transcript of the subsequent grand jury pro-

(a) Q. When were you down in Florida last?

(b) Q. Isn't it a fact that you ran a fairly successful dice game down in Dade County?

(c) Q. Who's Allie Harris?

(d) Q. How is the dice game going up in Harlem?

(e) Q. Cavallieri and Rosato are alleged to be connected with you in gambling activities, particularly in dice games. These two individuals are also known to be active in the narcotics field. Have you ever had any gambling contact with any one of them?

Evidentiary hearings were held on the order to show cause on November 19 and 24, 1964 (R. 38–75). Petitioner's request for a jury trial was denied (R. 47), as was his request to see the grand jury minutes for November 10 and 12 (R. 39–40). Petitioner's counsel challenged the relevance of the inquiries regarding gambling to the grand jury's investigation of narcotics, and government counsel replied that "in the narcotics area, gambling moneys go into narcotics and vice versa" (R. 50).

On December 2, 1964, the court found (R. 76–86), *inter alia,* that the grand jury was investigating narcotic violations (R. 77); that petitioner had been given complete immunity (R. 77–78); that the five specific questions not answered by petitioner were "relevant and pertinent to the investigation being carried on by the grand jury" (R. 80); and that peti-

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ceedings shows that he adhered to this position (R. 124–128) except that when the question was phrased "Are they connected with you in dice games?", petitioner declined to answer, explaining, "Anything with dice I refuse to answer." (R. 126).

tioner was guilty of contempt (R. 80). The court sentenced petitioner to imprisonment for one year "or until the further order of this Court should [petitioner] answer before the grand jury the five questions which appear on the record and which he was ordered to answer, and should [petitioner] answer these questions before the expiration of said sentence or the discharge of the grand jury, the further order of this Court may be made terminating the sentence of imprisonment" (R. 89–90).

ARGUMENT

1. This case does not involve the procedural issues raised in *Harris* v. *United States,* No. 6, this Term, since the trial court conducted the contempt proceedings under Rule 42(b) rather than under Rule 42(a). It does, however, involve the question (also presented by *Harris*) whether a one-year sentence may be imposed after a contempt hearing in which a request for a jury is denied. The sentence in this case states more explicitly than the one in *Harris* that it will be reduced if petitioner testifies, and the judge, in granting bail, reaffirmed that the one-year sentence was designed to make the coercion effective. For with the short remaining life of the grand jury (to March 1965), it was apparent at the time of sentencing that if petitioner could delay the conclusion of this litigation until the grand jury adjourned (which he succeeded in doing), he could effectively thwart any attempt to use civil contempt remedies in order to compel him to testify. Although these differences between this case and *Harris* exist, we recognize that the

Court may wish to defer action on this case pending determination of *Harris*. In view of the expiration of the grand jury's term, further delay in this matter is of minimal prejudice to the government, and we agree that it would be appropriate to defer disposition of this case until the related issue in *Harris* is resolved.

2. There is no merit to petitioner's claim that the immunity provision was improperly invoked. The statute does not require that the grand jury's questions to a witness relate solely to the witness' personal participation in narcotics offenses. Petitioner was asked to supply information concerning persons who, by reason of successful prosecutions against them and further investigation, were known to have been involved in the narcotics traffic. These questions did not become improper merely because they related directly or immediately to such persons' participation in illegal gambling activities. For it is well known, as government counsel observed in the district court, that gambling proceeds are often used to finance narcotics activities. In view of the interrelation of various forms of organized crime, it is proper for a grand jury investigating narcotics offenses to inquire about the gambling activities of suspected narcotics-law violators. If a grand jury investigation could be halted by a demand for proof of the relevance of specific questions, the inquiring body would be seriously hampered in its inquiry. Cf., *Marcus* v. *United States*, 310 F. 2d 143 (C.A. 3), certiorari denied, 372 U.S. 944; *United States* v. *Testa*, 326 F. 2d 730 (C.A. 3), certiorari denied, 376 U.S. 931; *United States* v. *Harris*,

334 F. 2d 460 (C.A. 2), certiorari granted on other issues, 379 U.S. 944; and see *Sinclair* v. *United States*, 279 U.S. 263, 296–298.

3. Petitioner's claim that he was denied the assistance of counsel is insubstantial. With the time of the grand jury running, the government was not obliged to await the convenience of counsel in undertaking to grant petitioner immunity on August 4. Apparently counsel made no effort to have another attorney represent his client while he was away. Instead he sought to delay the proceedings by instructing petitioner not to answer questions during the two weeks that counsel would be absent. Nevertheless, the government, specifically because of counsel's absence, requested that petitioner's next appearance before the grand jury be delayed until counsel returned. Hence no right of petitioner was prejudiced by this hearing. The only claim counsel later sought to invoke, namely the relevance of the questions to the narcotics inquiry, was fully heard and ruled upon by the court (see pp. 3–5, *supra*).[3]

[3] In the court of appeals (Pet. App. D 15a–19a) and in this Court, petitioner has presented an issue regarding the scope of Attorney General's immunity authorization. The Attorney General's letter, dated July 23, 1964, stated, *inter alia* (R. 101–102): "Should this witness claim said privilege against self-incrimination, therefore, you are authorized to make application" for a court order. Petitioner argues that this is a "conditional" approval which required that subsequent to July 23 and prior to the August 4 grant of immunity, petitioner be brought before the grand jury to claim his privilege. Petitioner does not contend that he would not have claimed his privilege if he had been recalled. In view of his total refusals in February, April and May, another trip to the grand jury

4. Petitioner's claim that his counsel should have been allowed to inspect the minutes of the grand jury was properly rejected by the courts below. The questions which were asked of him were stated in open court, and they were found to be relevant to the grand jury's inquiry. No disclosure of the remainder of the inquiry was necessary or appropriate. See *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 399–401; *United States* v. *Levine*, 267 F. 2d 335 (C.A. 2).

Respectfully submitted.

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JULY 1965.

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would obviously have been fruitless. Petitioner's subsequent refusal to answer after he was accorded immunity belies his present suggestion that he might have answered prior to the grant of immunity had he been recalled at that time. Moreover, the language in the Attorney General's letter was merely intended to insure that the witness would claim his privilege before being granted immunity; petitioner here did so on three prior occasions.

U.S. GOVERNMENT PRINTING OFFICE: 1965

Office-Supreme Court, U.S.
FILED
SEP 22 1965
JOHN F. DAVIS, CLERK

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—against—

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Respondent.

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES

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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES

In the "Memorandum for the United States" in this case, the Government had made certain statements to which I feel obliged to reply notwithstanding that the Government has also made the gratifying suggestion that the Court may wish to defer action on this case pending the determination of *Harris* v. *United States,* No. 6, this Term.

On Page 9 of its Memorandum, the Government states:

> "3. Petitioner's claim that he was denied the assistance of counsel is insubstantial. With the time of the grand jury running, the Government was not obliged to await the convenience of counsel in undertaking to grant petitioner immunity on August 4. Apparently counsel made no effort to have another attorney represent his client while he was away. Instead he sought to delay the proceedings by instructing petitioner not to answer questions during the two weeks that counsel would be absent. * * * "

This imputation that counsel had a dilatory motivation is unwarranted. The unfairness of the imputation is revealed when one scrutinizes the Government's above quoted prefatory words, "With the time of the grand jury running"—which suggest that this Grand Jury was fighting against time, that counsel knew it, and that counsel resorted to unworthy delaying tactics. The facts are: The witness-petitioner Tramunti was "processed" by this Grand Jury in an altogether leisurely manner as regards time, for Tramunti was first before the Grand Jury on February 13, 1964, then a second time not until April 23, 1964, and then again on May 7, 1964—all of which appearances preceded the appearance of August 4th when, for the first time, counsel was absent because he had to be absent owing to military duty, counsel having been present at all of the prior times. After August 4, 1964, the Government did not bother to bring Tramunti back before the Grand Jury again until November 10, 1964, although the same Grand Jury was in session during September and October. And this same Grand Jury was in existence until the middle of March, 1965. During the oral argument before the Second Circuit, the Court asked the Government what was the hurry in proceeding on August 4, 1964 in the absence of Tramunti's counsel, and the Government replied that the Grand Jury was going on vacation until September and that they were thinking of the convenience of the Grand Jury. The above quoted statement in the Government's Memorandum in this Court is the first time that the Government has raised any issue of the supposed running out of the time of the Grand Jury.

Respectfully submitted,

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